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The Study of Evidence

By EARLE KEZARTEE STANTON *of the Los Angeles Bar*
Professor of Law, Southwestern University

In the writer's opinion, based on some fifteen years of experience as an attorney, law writer and teacher, no subject now taught in the law schools is of greater importance to the practicing lawyer than that of Evidence. But observation also teaches that there is no subject more abused and less understood by students and attorneys. There is hope, however, that in the coming generation of lawyers, a school of practitioners is being and will be developed, who are thoroughly grounded in the rules of evidence. At the present time particular stress is being laid on this subject in most law schools, more time is being devoted to its study, and some practical application is made possible in practice court. This is at it should be.

The embryo lawyer must not be allowed to go out into the legal world carrying with him the idea that all evidence in favor of his client should be admitted and that all evidence produced by his adversary should be excluded on his blanket objection that it is "incompetent, irrelevant and immaterial." Yet, this is, to exaggerate a little, but not so much, apparently the sole idea carried by many attorneys, judging by their conduct in court. At least if they are acquainted with the rules of evidence, they are particularly successful in hiding that knowledge. This is not as it should be.

To use this hackneyed objection is in itself, in nine cases out of ten, a confession that the objector does not know the rules of evidence, and that he is relying on the Court to think up some rule by which the prejudicial evidence may be excluded, to his (counsel's) everlasting glory. The Supreme Court of California, as have the courts of most other states, has several times laid down the rule that this blanket objection is not good unless, of course, the evidence be entirely inadmissible for any purpose or upon any possible theory. Yet attorneys continue to make these same objections, although they should know the elementary rule which requires that counsel state the ground for his objection, so that the Court and opposing counsel may intelligently consider the merits thereof.

The young lawyer must be educated to understand that a law suit is an orderly and technical proceeding, governed by more or less technical rules. It is his business to know these rules. Upon hearing a question asked (and it should be remembered that the objection is to be made before the question is answered), he should know at once whether it violates a rule regarding hearsay, proof of other offenses, best evidence, impeachment or what not, and if he knows this, he will be able to make his objection specific. The court is then placed in a position where it can intelligently rule on the objection, and if the case goes up on appeal, counsel's rights are adequately protected in the record.

Likewise, the attorney offering evidence which has been objected to, should be able to point out to the Court that the objection has no merit, that in this particular case the offered evidence is admissible, because it comes within a well-recognized exception to the rule invoked; or, better yet, that the rule does not apply at all. If the objection made is of the blanket variety, and no ground therefor is given, the attorney should request that the objection be made more specific.

Another objection, much overworked, although perfectly proper in its place, is that "no proper foundation has been laid." This is well enough in cases of impeachment, authentication of documentary evidence, and in many other cases where the law clearly requires some preliminary evidence, but in those cases the reason should be given. To interpose this objection in season and out, without rhyme or reason, is again a confession of weakness.

Even assuming that certain evidence offered by your opponent is technically inadmissible, a further question arises whether it is worth while to put in an objection, and whether it is good policy. It is a well-known fact that sometimes a bit of evidence may go into the record without being seriously considered by the jury, whereas if an objection is interposed the evidence is thereby particularly called to the jury's attention, and the very fact that an objection was made may lead the jury to attach undue significance to such evidence.

Then, again, constant and repeated interruption of the examination of witnesses, with the ensuing delay, is certainly not conducive to that expediency which is so necessary in this day of congested court calendars. Nor does it tend to clarity of thought on the part of judge and attorneys. Certainly every lawyer owes a duty to his fellow members of the bar, and to the Court, second only to his duty to the client, to expedite in every way possible the trial of cases. He should not unnecessarily retard the progress of his trial with technical objections which do not in any way help his client's case or elucidate the question at issue. This pernicious habit, indulged in by some, of objecting to every question, is no mark of astuteness, but quite the contrary.

Nor do judges, as a rule, attach much significance to these frequent objections, for they are like the oft repeated crys of "Wolf! Wolf!" when there is no wolf. A well directed objection, accompanied by a clear statement of the ground therefor, will always receive the serious consideration of the Court, but this constant haggling, this undignified and senseless interruption of the orderly procedure of the court, has no place in present-day practice or ethics, benefits no one, and in reality amounts to a second degree contempt of court. Let the young lawyer get this firmly in mind.

The writer believes that the abuse of rules of evidence has, in no small way, contributed to lack of confidence in the bar. It is quite natural that the public, listening to alleged lawyers floundering in the sea of evidence, noisy but incoherent, loquacious but uninformed, should form certain conclusions which do not tend towards public confidence. For even the layman, unlearned in the law, knows the difference between the real thing and a poor substitute.

It is well for the student of evidence to observe the general trend of the decisions not only in his own state, but in the entire United States. If he will do this he will probably note that the general tendency is away from, not toward, excessive technicality. This tendency is to be observed in other matters of procedure, but particularly in matters of evidence, for a super-technical rule defeats its own ends, and again, contributes to the lack of confidence in the courts and attorneys.

It has been said that in respect to the liberality of our courts in admitting evidence we are approaching the broad rules of continental Europe; and that eventually, all evidence will be admitted, to be later considered or disregarded by the Court, as it sees fit. It is true that most of our trials in civil cases are conducted before a judge sitting as a jury,

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Delaware Issues Charters To Big Number of Firms

(By Associated Press)

DOVER, Del., Oct. 29.—Attracted to this state by one of the most liberal general incorporation laws found in the Union, between 65,000 and 70,000 corporations throughout the nation today are doing business under Delaware charters.

The features of the law which has made the state a Mecca to incorporators are few, but compelling. It is easy to comply with. It is speedy in operation. And it restricts the state's interest in, and supervision over, its charter holders to the apparent minimum compatible with the protection of stockholders.

LIBERAL FEATURES ATTRACT

Financially, Delaware requires an organization fee of ten cents per $1000 for the first $2,000,000 of authorized capitalization, and five cents per $1000 thereafter. Upon issues of no-par stock an arbitrary value of $100 per share is set, for the purpose of taxation only. Because of this latter provision, the total corporate value of Delaware charters is undeterminable.

The annual tax also is levied, on the basis of authorized capitalization. Simple annual reports are necessary, but they do not require disclosure of the corporation's financial affairs. Of all the company's books and records, only an original or duplicate stock ledger must be kept in Delaware. Here, except for provisions safeguarding stockholders, the state's interest ceases.

STOCK NOT TAXED

Stock held by non-residents is not taxed, nor is it subject to an inheritance levy. The corporation itself has no income tax to pay.

Incorporation can be completed within 24 hours. The incorporators need not personally appear or even be named. They may attend their first incorporators' meeting by proxy; the minutes and stock ledger will be mailed to them anywhere in the United States. Stockholders' and directors' meetings may be held anywhere.

Other powers of a Delaware corporation include issuance of any class of stock desired, with or without voting powers, and with no limitation upon the relative amounts issued or the rate of dividends.

Erroneous Conduct of Passenger Not Always Negligence

By TROY PACE *of the Los Angeles Bar*

An interesting principle of law is contained in the declaration that a passenger is not to be deemed guilty of contributory negligence in any instance for his erroneous conduct in a situation of danger produced or brought about by actionable negligence of the carrier.

Thompson's Commentaries on the Law of Negligence, Vol. 3, Sec. 2927, lays down the rule as follows:

> Sec. 2927. PASSENGER ACTING ERRONEOUSLY UNDER IMPULSE OF FEAR PRODUCED BY NEGLIGENCE OF THE CARRIER. It is a principle of obvious justice that one person cannot impute negligence to the act of another, which act has been induced by the negligent or wrongful act or ommission of the former; and this rule applies as between carrier and passenger. It follows that where the passenger acts erroneously under a sudden impulse of fear produced by the negligence of the carrier or his servants, in consequence of which erroneous action the passenger is killed or injured, whereas he would have escaped unharmed but for the same,—there may be a recovery of damages; for here, though the error of the passenger is nearer in time to the hurt which he receives than is the negligence of the carrier, yet in a juridical sense it is more remote. Perhaps it is a better statement of this doctrine to say that, in theory of law, the passenger is not guilty of contributory negligence at all, but that his error is the natural, and consequently the blameless consequence of the fault of the carrier. The real rule proceeds upon the theory that the misconduct of the carrier has produced the erroneous action of the passenger, and that it does not therefore lie in the mouth of the carrier to defend an action for damages on the ground of such erroneous action, thereby taking advantage of his own wrong. In other words, it does not lie in his mouth to say to the injured passenger: "You shall not have damages, because you did not act with reasonable care," if the misconduct of the carrier paralyzed the nerves or destroyed the volition of the passenger, so that he became incapable of acting with that care which persons under other circumstances employ. This principle does not, of course, relieve the passenger from the burden of proving that the apparent peril which caused him to take the erroneous course of conduct, was the result of the negligence of the carrier; for if the carrier was guilty of no negligence, and if the fright of the passenger was due to some other cause, then obviously, the carrier cannot be held liable; as in other cases, the foundation of any right of recovery is necessarily predicated on his negligence.

Numerous authorities from many states are cited giving support to this principle of law.

In White's Supplement to this authority under the same section number and title the additional statement is made that it is sufficient if the passenger acted upon a reasonable apprehension of im-

pending danger, it not being required that imminent danger of losing his life or receiving great bodily injury should actually exist. And amongst other later cases cited as sustaining the rule is that of *Western Maryland R. Co. v. State*, 95 Md. 637, 53 Atl. Rep. 969, where an injury was occasioned to a passenger by the passenger running out of the rear door of the caboose of a train and leaping from the platform while the train was yet in motion, resulting in his death, and which action upon the deceased's part was brought about by the breaking of an axle of a car in the train and the consequent anticipated danger therefrom. The Court said:

"The undisputed evidence shows that the injury which caused the death was inflicted, not by the broken axle, but by deceased's falling on his head when he jumped from the moving train. It is clear that the broken axle caused the derailment of the caboose, and that the derailment induced one of the occupants of that car to awaken deceased and to suggest to him to jump in order to save himself from injury. It is altogether probable that had he not jumped he would not have been hurt; and it is certain that he would not have jumped if the axle had not broken. If the breaking of the axle was due to the negligence of the defendant company in not properly inspecting the car before sending it out in the train, and was not the result of a hidden and undiscoverable defect, and if the deceased jumped, in the circumstances stated, because directed by an employee of the company to do so, then the equitable plaintiff — the widow — would be entitled to recover, because, while the breaking of the axle was not the immediate cause of the death, it was the efficient cause, or the

cause but for which the death would not have happened."

And White's later supplement to the same work, being Vol. VIII of the series, under the same section number and title, reiterates the general principle with the citation of additional authorities, with the words:

"The general rule is that a passenger in a situation of imminent danger, acting on impulses induced thereby, is not to be charged with contributory negligence in acting erroneously."

Amongst numerous authorities cited is the case of *Waniorek v. United Railroads*, 17 Cal. App. 121.

In *Waniorek v. United Railroads, supra*, the plaintiff was a passenger upon defendant's electric car, when the controller thereupon blew up or caught fire through the negligence of the defendant, and such created in the mind of the plaintiff a reasonable apprehension of injury, and in order to avoid such anticipated injury plaintiff jumped from the car while the same was in motion. There the Court instructed that if the foregoing facts were found and in addition that an ordinarily prudent and cautious person under like conditions and circumstances would have jumped from the car, that plaintiff was not guilty of contributory negligence, even though the jury also believed from the evidence that had he remained upon the car he would not have been injured. The District Court of Appeal in disposing of the objection of appellant to this instruction stated that it presented a hypothetical situation of peril to a passenger produced by the negligence of the carrier and which created in that passenger's mind a reasonable apprehension of danger, and upon the basis of the passenger acting as a reasonably prudent man to escape the danger is predicated the absence of contributory negligence; and that the only possible objection to it as a principle of law arises from the suggestion that the act of jumping from a moving car is irreconcilable with the theory of prudent and reasonable conduct. And the Court disposes of this suggested objection with the statement that the authorities are agreed that the circumstances may be such as to justify and even demand this perilous step, and that they positively affirm the doctrine of the instruction, with many of them stating the rule even more favorably for the injured person, and then quotes, approvingly, Sec. 2927 from Thompson on Negligence as hereinbefore set out. And follows up the quotation with illustrations of the rule from Sec. 2978 of the same authority and reference by title to more than a dozen of the many cases cited in said text.

The Supreme Court later in speaking of the Waniorek case said:

'The case of Waniorek v. United Railroads was one in which the evidence showed that plaintiff, who was a passenger on an electric car, was frightened by the blowing up and burning of a controller, caused by the negligence of the corporation. He jumped from the car and was injured. The Court refused to give an instruction to the effect that if an ordinarily prudent person, under like circumstances, would have done as plaintiff did, then he was not guilty of contributory negligence in leaping from the car. This refusal was held error, but (and) the District Court of Appeal quoted with approval from Thompson on Negligence the declaration that the rule is based upon estoppel, and proceeds upon the theory that the misconduct of the carrier has produced the erroneous action of the passenger, and that it does not therefore lie in the mouth of the carrier to defend an action for damages on the ground of

(Continued on Page 27)

Some Observations Concerning Notices of Non-Responsibility Under the Mechanic's Lien Law

By GLEN BEHYMER *of the Los Angeles Bar*

A consideration of this question requires the examination and reconciliation of the provisions of Sections 1185 and 1192 respectively of the Code of Civil Procedure, and a most careful consideration of the statutory changes made in Section 1192.

In examining the authorities on the subject, due consideration must be given to the status of the statutory law as it was applicable to the facts involved at the time of the origin of the given case, for in some instances the Appellate Courts at the time of the writing of certain opinions apparently did not have their attention called to statutory changes recently enacted.

It will be noted that Section 1192, as it now reads, requires that the Notice of Non-Responsibility be both posted on the property and recorded in the office of the County Recorder of the county in which the property is situated. The statute provides that this posting and recording must be done "within ten days after he shall have obtained knowledge of such construction, alteration," etc. The word "he" refers, of course, to the non-contracting owner.

Prior to 1907 and for many years previous to that time, the statute contained, after the quoted portion, the following additional words:

"Or the intended construction, alteration," etc.

In earlier years posting of the notice only was required. In 1907 the statute was changed so as to require either posting on the property or recording in the office of the County Recorder. In 1911 the section was again modified so as to require, in the conjunctive, both posting *and* recording.

No other change has been made since 1911 in the statute except in the year 1925 a slight change was made as to what was required to be stated in the notice.

A strict compliance with the statute on the part of the owners of the property is required. (Pasqualetti v. Hillson, 43 Cal. App. 718.) By filing a notice of non-responsibility *within the time limit*, the owner's property is relieved of responsibility. (Whiting-Mead Com. Co. v. Brown, 44 Cal. App. 371.) In this last mentioned case we find the following:

"As pointed out by the respondent, prior to 1911, it was provided by Section 1192 of the Code of Civil Procedure that the owner should file such notice within ten days 'after he shall have obtained knowledge of such construction, alteration, or repair *or intended construction, etc.*' But that section has been amended by elimination of the italicized words. Such definite change indicates an intention that the owner should be relieved of responsibility by filing said notice within the time limited after knowledge of the actual improvements."

It must be borne in mind in considering this matter, that the theory of the law is not that the owner is freed from liability after notice is given, but rather failure to give notice charges his interest with liability for the whole of the work done. (John R. Gentle & Co. v. Britton, 158 Cal. 328.)

This case involved work which was completed in 1906 prior to the 1907 amendment, and, therefore, prior to the dropping from the statute of the language, "or the intended construction."

In the opinion of the Court in this matter, we find the following:

"*The statute as originally enacted did not contain the clause, 'intended construction,' and the time for posting the notice was fixed at three days after knowledge of the construction, alteration or repair. This must then be construed to mean of the progress of the work, which could not have been earlier than the commencement of the work*, and it has been held that where an owner had knowledge of 'the intended construction' and did not give the notice within three days thereafter, but gave such notice within three days after the commencement of the work, he was entitled to the protection of the statute. (Birch & Co. v. Magic Transit Co., 139 Cal. 496, 500, [73 Pac. 238].)

"The law does not say that upon the posting of the notice the owner will not be liable for any labor performed or material furnished thereafter, but that if he fails to post such notice within the statutory time after the knowledge that the improvement was being made, it shall be held to have been constructed at his instance."

It must, therefore, be concluded that since the present statute no longer contains the clause "intended construction," the words, "knowledge of such construction," must be construed to mean knowledge of the actual progress of the work, which knowledge, of course, cannot be acquired earlier than the actual commencement of the work.

Obviously, therefore, posting or recording prior to the commencement of the work is premature and of no legal effect.

An analogous situation existed under the Mechanics' Lien Law, prior to the 1919 amendment to Section 1187, with reference to the time within which mechanics' liens might be filed for record.

Section 1187 of the Code of Civil Procedure, prior to the 1919 amendment, permitted a subcontractor, materialman or laborer to file his liens either "within 30 days *after* he has ceased the labor or has ceased to furnish materials . . . . or at his option, within thirty days *after the completion* of the original contract under which he was employed."

Under this law many liens were filed which were invalid, being too late to be within thirty days after completion of the particular lien claimant's work and being premature as having been filed prior to the completion of the structure; so, in the year 1919, in order to eliminate this situation, Section 1187 was amended so as to permit the subcontractor, materialman or laborer to file his lien "at any time *after* he has ceased to perform labor or furnish materials, or both, for any work of improvement mentioned *and until* thirty days *after* the completion of such work of improvement."

The Court in the case of Roylance v. San Luis Hotel Co., 74 Cal. 273, construes the words, "within thirty days *after* the completion of the building," in the manner indicated in the following quoted opinion:

"In Perry v. Brainard, 8 Pac. Rep. 430, it was said:

" 'The Court below found that the lien which was sought to be enforced by the action was filed prior to the completion of the building, and was therefore prematurely filed. The statute reads: 'Every original contractor, within sixty days after the completion of his contract, and every person save the original contractor, claiming the benefit of this chapter, must, within thirty days after the completion of any building, improve-

ment or structure, or after the completion of the alteration, or repair thereof, or the performance of any labor in a mining claim, file for record,' etc. (Code Civ. Proc., Sec. 1187.) It will be seen that the time prescribed by the statute for the filing of the plaintiff's claim was 'within thirty days after the completion of the building.' Under a similar statute, the Supreme Court of Kansas lately held in two cases, Davis v. Bullard, 32 Kan. 234, and Seaton v. Chamberlain, 32 Kan. 239, that a claim so filed was premature, and a lien based thereon could not be enforced."

It is clear, therefore, that by analogy, a statute requiring work to be done within a certain period *after* the happening of a certain event would not permit the doing of the thing prior to the happening of that event; and that the doing of the thing prior to the happening of the event would be of no legal efficacy.

Of course, if the owners had no knowledge of the actual construction until, we shall say, the building was half completed, and had no knowledge of facts sufficient to put a prudent person on inquiry, (see Evans v. Judson, 120 Cal. 282), then if he does post and record his notice of non-responsibility within ten days after he has obtained knowledge of the actual construction, or knowledge of facts sufficient to put a prudent person upon inquiry, then his interest in the property is protected from liens. There is, therefore, no limitation in respect to the stage of the work at the time at which the notice must be posted, *provided* the owner has posted and recorded it within the statutory period, after he has acquired knowledge.

Manifestly, the form of the notice and its contents must comply strictly with the requirements of the statute, and the provisions as to verification must be observed carefully. It is only by the giving of this notice that the owner can protect his property from liens. Stipulations in leases have been uniformly held ineffective for this purpose. (Pacific Sash & Door Co. v. Bumiller, 162 Cal. 664.) The notice, of course, must be posted in some conspicuous place upon the property, and both posting and recording are absolutely required. An acknowledgment is not such a verification as is contemplated by the statute. (Pasqualetti v. Hillson, 43 Cal. App. 718.) The notice of non-responsibility is required from a landlord whose tenant undertakes alterations or improvements upon the premises. (Pacific Sash & Door Co. v. Bumiller, 162 Cal. 664.) Also of a vendor under contract of sale, whose vendee undertakes improvements upon the premises involved. (Allen v. Wilson, 178 Cal. 674.) It is not required of a trustee or beneficiary under a deed of trust, such deed of trust being treated as an incumbrance. (Hollywood Lumber Co. v. Love, 155 Cal. 270.)

Failure to give notice of non-responsibility renders the interests of the owner of the property, or other person having or claiming an interest therein, and not being a contracting owner, subject to valid liens in favor of the contractor, sub-contractor, materialman or laborer, but it does not charge him with any personal liability. (Boscus v. Bohlig, 173 Cal. 687.)

Notice of non-responsibility, of course, does not relieve the interests of a *contracting owner* from liens.

Exchange List

The Kentucky Law Journal, a very commendable publication, has been added to the BULLETIN exchange list of twenty-four leading legal periodicals.

Message of the Los Angeles C of of Certified A

The Value of the C Pu

The idea prevails among a large of th attained the dignity of "Big Business" alue lies merely in making an audit for the of b shortage. Nothing can be farther from.

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The Doctrine of Charitable Trusts

By Louis Thomsen, J. D.

(Continued from last issue)

KINDS OF CHARITIES

Charities may be divided into the following four main divisions: religious charities, eleemosynary charities, educational charities, and municipal charities.

Let us first consider religious charities. There are many cases in California upholding religious purposes as charitable. (Estate of Hinckley, *supra;* Alemany v. Wensinger, 40 Cal. 288; Estate of Eastman, 60 Cal. 308; Estate of Hewitt, 94 Cal. 376; Estate of Emeric, 5 Cof. Prob. Dec. 286; Estate of Herzo, 2 Cof. Prob. Dec. 165; Estate of Lubin, 62 C. D. 14; Estate of Graham, 63 Cal. App. 41.) These cases hold that a trust will be a valid religious charity when it is created for the furtherance of religion, for the support of a church, for the support of missionaries, for the inculcating of the doctrines of the church, and for the performance of religious observances and acts of worship. Gifts to all various religions are equally upheld because of our constitutional guaranties of religious freedom. (Estate of Hinckley, *supra;* Estate of Lennon, 152 Cal. 327; Estate of Herzo, 2 Cof. Prob. Dec. 165; Estate of Hamilton, 181 Cal. 758.)

We come now to eleemosynary purposes. The word "eleemosynary" comes to us from the Greek, meaning alms. In speaking of eleemosynary purposes we shall deal with the word in its Greek meaning, though the term has been interpreted to be synonymous with the word "charity."

An institution, to be charitable, must have for its purpose the helping of the poor and needy; it must have been organized, not for private gain, but for the aid of the public. However, the fact that pay patients are also received does not affect the public character of the institution so long as the money received is applied to the maintenance of the organization. (Burdell v. St. Luke's Hospital, 37 Cal. App. 310; Estate of Sharp, 3 Cof. Prob. Dec. 279; Estate of Campbell, 175 Cal. 345; Estate of Willey, 128 Cal. 1.)

As to educational charities. It is beyond question that education and learning dispensed by state schools, colleges, and universities are charitable purposes. In order that learning and education be charitable objects, when dispensed by private agencies, the learning must be for the public benefit and not for private gain. (Estate of Sutro, 155 Cal., at 735.) It is not necessary, however, that such education or learning be given to the poor alone—it may be given to the rich as well. Nor need the tuition be given gratuitously; but, if fees are charged, they must be wholly used for the maintenance of the institution itself. (People v. Cogswell, 113 Cal. 129.) Charities are so far favored that the burden of proving that an educational institution is a private and not a public enterprise is on those who seek to avoid the gift. (Spence v. Widney, 5 Cal. U. 516.)

Barring schools conducted as business ventures for commercial purposes, gifts to schools, high and low, public and private, general or special, have been upheld as valid charitable purposes. (Estate of Royer, 123 Cal. 614; Spence v. Widney, 5 Cal. U. 516; Estate of Winchester, 133 Cal. 271; Estate of Budd, 166 Cal. 286; People v. Cogswell, 113 Cal. 129; Estate of Goodfellow, 166 Cal. 409; Estate of Sutro, 155 Cal. 727.)

The last main division of charities consists of those for municipal purposes. "Since a gift to a small body of indefinite persons is a charity, a gift to a larger body, and that the governing body of the community, is certainly no less such, though it does nothing more than relieve the tax-paying class from a part of its burdens." (Zollman, American Law of Charities, page 212.) And the mere fact that ample provisions have been made by law for the same purpose does not change

the situation. A gift to the state in trust to apply the same in executing a lawful function may very well create a valid charity. The purpose, of course, must be a public one and not one existing for profit. In other words, if the charity were a valid one if conducted by individuals or private corporations, it will be valid if conducted by the state or one of its agencies.

Hence gifts for public schools, whether high schools, colleges or universities; public libraries; public parks; monuments in parks; trees on public grounds; public burying grounds; and poor relief, have all been held to be proper subjects of public charity conducted by the government.

REGULATION OF CHARITIES

Thus far we have dealt with the origin, definition, and classification of charitable trusts or charities. We will now deal briefly with the regulation of charities.

Perhaps the most important statute regulating charities, or, rather, gifts to charities is section 1313 of the Civil Code, which provides as follows:

> "No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made at least thirty days prior to such death, such devise or legacy and each of them shall be valid; provided, that no such devise or bequest shall collectively exceed one-third of the estate of the testator, leaving legal heirs, and in such case a pro rata deduction from such devises or bequests shall be made so as to reduce the aggregate thereof to one-third of such estate; and all dispositions of property made contrary hereto shall be void and go to the residuary legatee and devisee, next of kin, or heirs, according to law; and provided, further that bequests and devises to the state, or to any municipality, county or political subdivision within the state, or to any state institution, or for the use or benefit of the state or any state institution, or to any educational institution which is exempt from taxation . . . . or for the use or benefit of any such educational institution, are excepted from the restrictions of this section; provided, however, that nothing in this section contained shall apply to bequests or devises made by will executed at least six months prior to the death of a testator who leaves no parent, husband, wife, child, or grandchild, or when all of such heirs shall have by writing executed at least six months prior to his death, waived the restriction contained herein."

The purpose of this section is not to prevent charities from receiving testamentary gifts of property, but to benefit exclusively heirs at law, acting as a protection against hasty and improvident gifts to charity by a testator of his entire estate to the exclusion of those who, in the judgment of the legislature, have a better claim to his bounty. (Estate of Dwyer, 159 Cal. at 687; President of Bowdoin College v. Merritt, 75 Fed. at 486.)

The section applies only to charitable gifts or donations. The trust must be created by will in order that the section apply—deeds, and trusts created during the lifetime of the donor in order to avoid the restriction which the section puts on testamentary liberality, are not affected—they are valid. (Pres. Bowdoin College v. Merritt, *supra.*)

If the will is made within thirty days of death, the devise or bequest is absolutely void (unless it comes within one of the excepted classes). If the will is made at least thirty days prior to death, the testator can leave one-third of his estate to charity if he leaves legal heirs; but if he leaves no legal heirs he may leave all his estate to charity.

The "one-third" provision mentioned in the section means one-third of the distributable estate, after all fees and charges of administration have been paid, and not one-third of the gross estate. (Estate of Hinckley, *supra.*) Gifts in excess of the one-third are not void, but, upon distribution, their aggregate must be reduced to the legal limit; and, in making such reduction, the residuary legacy, if it be of the partially prescribed character, must

give way to the specific bequests which are of the same character. (Estate of Hamilton, 181 Cal. 758.)

If a will contains bequests to charitable organizations and is executed more than thirty days before the death of the testator, the fact that a codicil relating wholly to other matters is executed within thirty days of the death of the testator will not invalidate the charitable bequests in spite of the fact that the codicil ordinarily has the effect of republishing the will, as modified by the codicil, and in spite of the further fact that for some purposes the will speaks as of the date of the codicil. (Estate of McCauley, 138 Cal. 432.) However, if the codicil so executed modifies the original valid charitable bequest, that original bequest is revoked and the codicillary bequest is void under section 1313 of the Civil Code (Estate of Sharp, 3 Cof. Prob. Dec. 279); and the charities mentioned take neither under the will nor under the codicil—not under the will because that is revoked, nor under the codicil because it is executed within thirty days before the death of the testator.

In 1903 an act (Act 1330, Deering's Genl. Laws, 1923) was passed by the legislature which created a state Board of Charities and Corrections. This board had power, and it was its duty, to investigate and report on charitable, correctional, and penal institutions of the state and such public officers as were in any way responsible for the administration of public funds used for the relief or maintenance of the poor. In 1925 the legislature adopted an act adding sections 2330-2347 to the Political Code. (Laws of 1925, Chap. 18, page 19.) By this act, a state Board of Public Welfare was created, which board succeeded to the powers and duties of the state Board of Charities and Corrections.

Since, in every charitable trust, the public at large is the real beneficiary; and, owing to the fact that the beneficiaries are vague, and therefore cannot enforce a charitable trust, the attorney-general is the proper person to represent the beneficiaries as a plaintiff or defendant. (People v. Cogswell, 113 Cal. 129; Estate of Sutro, 2 Cof. Prob. Dec. 120.) The public interest must be directly involved as to some distinct issue in order to prevent the cause from proceeding to a decision without the presence of the attorney-general as a necessary party; that is, if the interest of the public is only remotely or accidentally involved, the attorney-general is not a necessary, though he may be a proper party.

Charities are subject to governmental regulation under the police power, provided such regulation is reasonable. Thus, in the case of In Re Dart, 155 Pac. (Cal.) 63 (1916), the city of Los Angeles created a Municipal Charities Commission and forbade any person, firm, etc., the right of soliciting for charity, regardless of his personal character, worth, or fitness. The court held that, though charities are subject to the regulation of the police power, the ordinance in question transcended the limits of reasonable regulation and was therefore unconstitutional and void.

PRIVILEGES OF CHARITABLE INSTITUTIONS

Charities are exempt from taxation. By Act 1743 of Deering's General Laws of 1923, domestic corporations, and foreign corporations doing intrastate business in California, are subjected to an annual license tax, and, for the failure to pay the same such corporations are precluded from doing business. But, by the terms of the act, corporations organized for educational, religious, scientific or charitable purposes, and non-profit corporations, etc., are not subject to the tax prescribed by that act.

Under Article XIII of the California Constitution, property used for free public libraries and property used exclusively for public schools is exempt from taxation (Section 1); the property of an educational institution of college grade, not conducted for profit, is exempt under Section 1a; the property and buildings of institutions for religious wor-

(Continued on Page 28)

Case Notes*

ALBERT E. MARKS *of the Los Angeles Bar*

COPYRIGHT OF PROGRAMS

In connection with the operation of its broadcasting station, plaintiff published a program of its activities for the ensuing week. This involved considerable labor, skill and expense. Defendant copied much of this material, whereupon plaintiff brought suit for infringement of copyright. Judgment was for plaintiff, and it was held that the program was a proper subject of copyright. British Broadcasting Co. v. Wireless League Gazette Co. (1926) 1 Ch. 433.

The Copyright Acts in England and the United States provide for copyright in literary work, and also provide that "compilations" are within the scope of literary work. The decision in the instant case is in accord with previous decisions holding copyright to subsist in such works as railway guides, directories, and telegraph codes. It is, however, an extension of old doctrine to protect a new species of intellectual effort. The law is stable; nevertheless it is always in flux. Thus it is able to adapt itself to the changing conditions of life, and solve new problems as they arise.

ALBERT E. MARKS.

ENJOINING RADIO INTERFERENCE

The Chicago Tribune had been operating a radio station, WGN, in Chicago for a considerable length of time. It was affording service to the listeners in that vicinity and over a very wide area which it alleged to be of a high character. Its communication had been undisturbed and it had developed a clientele. WGES station had been operating in Chicago, but on a wave length so far removed from that of WGN that no interference of any kind resulted. However, when the bars were thrown down and stations became at liberty to choose wave lengths for themselves, WGES changed the wave length of its station and proceeded to operate upon one which had a separation of only forty kilocycles from that of WGN.

In the absence of any law on the subject and any governmental authority with power to assign wave lengths, there remained no recourse on the part of WGN except an attempt to obtain relief through the courts. It then applied to the State court of Cook County and obtained a preliminary injunction forbidding the defendant company from using any wave length within fifty kilocycles either side of the wave length used by WGN.

The court was called upon to decide two points, both of importance. First, it had to determine whether or not under any known rules of law a court had the power to grant the relief asked for. Judge Wilson, who wrote the opinion, said that it was a case unique in judicial annals and without direct precedent, but that nevertheless under the general principles of the common law relief might be granted.

He found authority for this decision in the water right cases from the Western States, where the rule of first come, first served, has been laid down by the courts so that today the individual who first appropriates the water of a running stream and puts that water to beneficial use may hold it against any one who later attempts

**Editor's Note*—The *Bulletin* will be pleased to accept for publication reviews of, and comments on, recent decisions; and members of the bar are urged to co-operate with Mr. Marks in making *Case Notes* a noteworthy feature of the *Bulletin*. Reviews should be mailed to the *Bulletin* office.

to take it, even though there can be no such thing as absolute ownership in running water.

Further analogy was found in the decisions which have protected telephone services against interference from high tension electric wires whose current leaked or jumped to the telephone wires and interfered with telephone service, the rule adopted by the courts in those cases being that priority in time gives priority in right. Based upon these analogies, Judge Wilson held that the same principle was directly applicable to radio broadcasting and that the station which had adopted a certain wave length and established its service on that wave length has created a station in which the public are sufficiently interested so that it may be protected against the invasions of a later comer.

The second question which the court was called upon to decide was as to whether there was actual interference in the case presented. He decided that the fact of interference had been sufficiently proved. Judge Wilson did not decide that the late station might not operate at all. He merely held that it might not select a wave length which interfered with a prior occupant. The late comer in radio is, therefore, in much the same position as the driver of an automobile who seeks a parking place and who finds them all occupied. No one says to him that he may not park his car, but on the other hand he may not remove a car already parked in the block which he himself desires to occupy. He must journey from block to block until he finds a vacant place, even though it be not as convenient as one he desires. So the late comer in radio may not select his position merely as his whim, but must do so with due deference to those who are already in the field. The practical result, however, may very well be that the late comer will have great difficulty in finding a place to rest.

It should be remembered also that the case before Judge Wilson involved two stations in the same locality, the distance being something like forty miles between the two transmitters. While the decision is authority for the proposition that as between them the courts will give relief, the question as to the area over which such protection will be extended is still open and undecided.—*New York Times*, November 28, 1926.

Questions of Legal Ethics

(Report of Committee on Professional Ethics, The Association of the Bar of the City of New York.)

QUESTION No. 24

RELATION OF ATTORNEY AND CLIENT, UNDUE PERSONAL INTEREST IN THE ACTION, AND IMPROPER CONTROL THEREOF;—BY EXTENDING CHARITY TO CLIENT DURING PENDENCY OF ACTION.

This question was raised by the following communication:

"I have a client (a minor) who was a seaman. He came to my office and retained me to bring an action for damages against the owners of a large steamship on the theory that the negligence of the company caused the injury—Loss of hand. I investigated the case and found out that the appliance with which he was working, and the place in which he was working was dangerous, and that it seemed to be a meritorious cause.

He has left the hospital and the stump of his hand is still unhealed. He has

been unable to find any employment. His father and mother live in a foreign country. He has an uncle who lives in..... but this uncle has a large family to support and cannot afford to take care of him.

An artificial hand made of rubber can be made and with the use of it he can probably find employment to keep him alive until his case is reached for trial. Of course, later on he can adapt himself to some other work which will be lucrative.

Do you consider that there is any impropriety on my part in paying for the artificial appliance in order that he should be able to earn a living? Secondly is there any impropriety in my giving him employment temporarily at my office in running errands, etc., which would enable him to earn enough to live decently assuming that he cannot get other employment? Third, would it be improper for me as his attorney to advance him a little money to keep him from actual physical suffering pending his trial?

The alternatives are these: If he becomes a public charge, being an alien he will be deported. Secondly, if he is permitted to starve, his physical suffering will be such that he will be compelled to accept a very small and inadequate offer that the Insurance Company for the defendant Steamship Company have made. I consider that the amount they have offered him is about one-twentieth of what a jury would award my client."

ANSWER

In the opinion of the Committee, charity is in accord with the best traditions of the profession, and the best form of charity is to help the needy to help themselves. But when the apparent charity is an inducing cause for the employment of the lawyer or a reward for his employment, to prosecute the rights of the client, then the Committee would disapprove it, and it would probably be a violation of Section 274 of the Penal Law of New York.

It seems to the Committee that the type of charity indicated in the question must inevitably result in a greater control of the action by the attorney than is consistent with the free agency of the client who receives that charity and in the creation of an undue personal interest in the action on the part of the attorney.

Should the attorney retain his professional relations with the client and procure assistance and employment for him from charitable agencies or other individuals, or should he do these things himself and sever his professional relations or renounce compensation for his services, his action would be wholly commendable.

The courses outlined in the inquiry, in so far as they are inconsistent with the foregoing principles, would, in the opinion of the Committee, be improper.

QUESTION No. 25

ATTORNEY ENGAGING IN BUSINESS:—TAKING OUT LICENSE AS INSURANCE BROKER.

Is it professionally proper for an attorney to take out a license as an insurance broker?

ANSWER

In the opinion of the Committee, it is professionally proper for a lawyer to take out a license as an insurance broker provided that it is not used as a cloak to obtain legal business and further, provided that in the conduct of the business of an insurance broker he should not be guilty of any practice inconsistent with the principles which should govern the conduct of a lawyer.

QUESTION No. 32

ATTORNEY AND CLIENT—FORMER EMPLOYMENT.

Is it proper professional conduct for attorney A who has incorporated and

thereafter represented corporation B and who has prepared an agreement executed by B and an individual C, subsequently to represent C; the professional relations between A and B having been severed. C desiring A to obtain a mandamus against B to exhibit its corporate books. which proceeding may bring into issue the agreement made between B and C?

ANSWER

In the opinion of the Committee, it is not proper professional conduct for A to accept a retainer from C in any proceedings against the B Corporation. Attention is directed to Canon 6 of the Canons of Ethics of the American Bar Association, and particularly to that part of the Canon which reads as follows:

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidence forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

QUESTION No. 38

ATTORNEY—ALSO USING TITLE OF C. P. A.

Is there any professional impropriety in an attorney, who is also a certified public accountant, styling himself "counsellor at law and certified public accountant"?

ANSWER

In the opinion of the Committee, no impropriety would result from the addition of the words "Certified Public Accountant."

QUESTION No. 42

ATTORNEY AND CLIENT—FORMER EMPLOYMENT.

Is it proper professional conduct for an attorney to represent A in a divorce action to be brought against Mrs. A, the attorney having formerly defended Mrs. A in a criminal proceeding involving her chastity, in which his fee was paid by A, the proof in the proposed divorce action being entirely different from that in the criminal proceeding?

ANSWER

The Code of Ethics of the American Bar Association provides (Canon 6 of the Canons of Professional Ethics):

" . . . The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

In the opinion of the Committee, the subject matter of the two suits is so closely related that the Committee regards it as professionally improper for the attorney to accept the subsequent employment.

QUESTION No. 43

ATTORNEY—ADVERTISEMENT, SOLICITING EMPLOYMENT

Is it proper professional conduct for an attorney, retained to bring suit against reorganization managers of a railway company for the delivery of securities to which his client would have been entitled had he deposited his stock within the time limited in the reorganization plan, to advertise for stockholders similarly situated and request them to join with his client and contribute to the expense of such action?

ANSWER

In the opinion of the Committee, it is improper professional conduct to advertise for clients (see Canons 27 and 28 of the Canons of Ethics of the American Bar Association).

QUESTION No. 47

ATTORNEY AND CLIENT—ACTION AGAINST ANOTHER ATTORNEY.

Two infants were run down by an automobile driven by an intoxicated person

and badly hurt. Counsel retained by infants' guardian started an action for one of the infants by service of summons. For a period of six years nothing further was done by the attorney other than to reiterate that the case was on the calendar and would be shortly reached. Investigation discloses that one action only was ever instituted and that this action was dismissed on the ground that the counsel had not served his complaint after demand, the motion to dismiss not being even opposed.

Is it proper professional conduct for an attorney to accept a retainer in an action or proceeding to seek redress against such counsel?

ANSWER

The Committee on Professional Ethics does not pass on questions of law. As an abstract question, a lawyer is no more immune from suit than is a layman. If the inquirer believes he has a cause of action against the attorney retained to defend the rights of the infants, he should promptly present the matter to the court or to the Grievance Committee of the proper Association of the Bar.

STUDY OF EVIDENCE

(Continued from Page 6)

and since he is learned in the law of evidence, it may be presumed that he will disregard improper evidence and will not be prejudiced as a juror might be under similar conditions. Despite the apparent confusion which such a rule might be expected to bring about, the idea is not without merit, although it is doubtful whether it will ever be adopted in its entirety.

Many of our states are now exceedingly liberal in this matter, and members of the bar have been educated to the point where objections to evidence are few and far between. California is in this respect, perhaps not quite so liberal as some other states in the middle west and elsewhere, but the best lawyers appear to be following the more liberal rule, and law teachers are commending the practice to their students. Law writers on the subject of evidence have also seen the necessity of greater liberality, and the influence in this particular of the writings of Wigmore and of Jones and others, has been considerable.

There is little question, of course, but what some of our rules of evidence should be altered to meet present day conditions, but with the growing tendency towards liberality, just mentioned, it is doubtful whether we should attempt to hasten these changes. There is a certain natural corrective influence always at work in these matters. Law, and particularly the law of evidence, is constantly changing to meet the real necessities of practice, and a revolutionary attitude demanding the instant overthrow of existing rules and the substitution of some one's half-baked ideas is to be deplored. Better put up with some slight inconvenience than emperil the fabric of the law, which after all, is and always will be dependent on precedent.

The study of evidence cannot be taken up in a haphazard manner, nor can it be mastered without conscious effort. Composed of many rules and more exceptions to each rule, purely or largely arbitrary in nature, the subject calls for much memory work in addition to the usual legal reasoning with which process students should be familiar by the time they reach the important study of evidence. You cannot guess at it, you cannot reason it out, you cannot approach it by logical stepping stones—you must

learn it, and much of it word for word.

Nor can you take in the whole field of evidence at a glance, for it is, in fact, not one subject, but many. Some of the main divisions of the subject, such as Hearsay, Best Evidence, Parol Evidence, Character Evidence, etc., are almost as much separate subjects as are Torts and Contracts, and there is no connection whatever between them. Each must be studied separately and mastered before proceeding to the next division.

Judicial evidence, according to our Code of Civil Procedure, Section 1823, "is the means, sanctioned by law, of ascertaining, in a judicial proceeding, the truth respecting a question of fact." Exposition of the truth is the main object of any judicial inquiry. The machinery for making this inquiry must afford a direct and searching medium not too cumbersome or complicated for practical results. It must at all times, however, provide an orderly and systematic method of approach—hence, we have rules of evidence. Until our students, our lawyers, and our judges, come to realize just how much depends on a thorough working knowledge of these rules and recognize how indispensable such knowledge is if we are to rehabilitate ourselves in the eyes of the public by furnishing a comprehensive and expeditious system for the workings of justice, there is little hope for improvement. What the profession needs is less noise and more thought, less talk and more study, fewer objections to evidence and more knowledge of the subject itself.

ERRONEOUS CONDUCT OF PASSENGER

(Continued from Page 10)

such erroneous action thereby taking advantage of his own wrong."

Wood v. L. A. Ry. Corp., 172 Cal. 15, 25.

In a much earlier case, the Court had announced the same principle, based upon another very high authority on Negligence. There the injured person was not a passenger, but was struck by the car while attempting to cross the tracks. The Court after calling attention to the possibility, yes, to the probability, that the injured party was brought into this position by the negligence of the motorman, and that he was excusable for omitting some precautions or making an unwise choice, said:

"This is especially true if the peril is caused by the defendant's fault; and of such case it is said: 'Even if, in bewilderment, he runs directly into the very danger which he fears, he is not in fault. The confusion of mind, caused by such negligence, is part of the injury inflicted by the negligent person.' Shearman and Redfield on Negligence, Sec. 89, and cases cited."

Schneider v. Market St. Ry. Co., 134 Cal. 482, 490.

The District Court of Appeal, in a case where the passenger was either caused to fall or jumped from a moving street car by reason of the wrongful act of the conductor in assaulting the plaintiff, adverted to the fact that even if it be true that it subsequently developed that plaintiff did not exercise the best judgment in the manner of resisting the assault of the conductor under the circumstances, yet that fact of itself cannot and does not constitute negligence on his part, and stated:

"This is especially true if the peril is caused by the defendant's fault, and of such case it is said: 'Even if, in bewilderment, he runs directly into the very danger which he fears, he is not in fault. The confusion of mind, caused by such negligence, is part of the injury inflicted by the negligent

person.' (Schneider v. Market St. Ry. Co., 134 Cal. 490, [66 Pac. 734], citing and quoting Shearman & Redfield on Negligence, Sec. 89.)

"The plaintiff here, as seen, was a very old man, of intelligence, occupying a responsible position and laboring under the belief—a mistaken one, it is true—that, having paid his fare to the first conductor, he was entitled to be taken to his home without producing a transfer check by explaining to the conductor on the car to which he transferred the circumstances attending his omission to secure such check. He was, according to his story, which was accepted by the jury, pounced upon by the conductor in a violent and brutal manner, and roughly commanded to pay his fare. Is it to be wondered that in his indignation at such treatment he would become perturbed and confused? If, therefore, he acted injudiciously under the circumstances, upon whom should the responsibility of such want of discrecretion on his part be required to rest? The law answers that it must fall upon him by whose negligence such indiscreet conduct was caused."

Braly v. Fresno City Ry. Co., 9 Cal. App. 417, 432.

And the District Court of Appeal has again quoted approvingly the Schneider case, where a passenger upon a stage coach jumped therefrom. The judgment was for the defendant and upon appeal it was insisted by the plaintiff that there was no evidence in the record to support the finding of the trial court that negligence was not attributable to the defendant, and with which the appellate court agreed, with the statement:

"Assuming as we do that the driver drove his coach into a dangerous place and exposed the passengers to peril, the act of the plaintiff in attempting to jump from the coach was not contributory negligence. It is said by our Supreme Court in Schneider v. Market Street Ry. Co., 134 Cal. 482, that 'even if, in bewilderment, he runs directly into the very danger which he fears, he is not in fault. The confusion of mind caused by such negligence is part of the injury inflicted by the negligent person.'"

Dinnigan v. Peterson, 3 Cal. App. 764, 767.

DOCTRINE OF CHARITABLE TRUSTS

(Continued from Page 21)

ship are exempt under Section 1½; by Section 1½a of the same Article, the property of institutions sheltering more than twenty orphan or half-orphan children receiving state aid is exempt.

As to tort liability, a charitable organization occupies a favorable position. "A charitable institution is not liable to persons under its care for injuries caused by the negligence of its servants provided due care has been used in the selection of the servants." (Thomas v. German General Benefit Society, 168 Cal. 183.) This rule is based on the "trust fund doctrine;" that is, the courts say: "The fund having been given for charitable purposes it is to be used for those purposes alone, and hence the fund cannot be impaired by being used for the payment of damages to those injured while in such institution." "Moreover," say the courts, "when one accepts the benefit of a public or private charity he exempts by implied contract the benefactor from liability for the negligence of the servants in administering the charity if the benefactor has used due care in the selection of those servants." (Burdell v. St. Luke's Hospital, 37 Cal. App. 310.)

Charities are exempt from the rule against perpetuities. Article XX, Section 9, of the California Constitution provides: "No per-

petuity shall be allowed except for eleemosynary purposes." The word "eleemosynary" has been construed to be synonymous with "charity." (People v. Cogswell, *supra.*)

The perpetuities prohibited by the common law did not include trusts for charitable uses—they were always exempt from the operation of that rule. The constitution, therefore, did not adopt a new rule, but expressly recognized one already existing. (Estate of Sutro, 155 Cal. 727 at 733.) Says the court in Estate of Hinckley, 58 Cal. 457 at 473:

> ". . . . the constitution adopted the common law rule, which never applied to charities, and is to be read as if it had said: 'Perpetuities shall not be allowed, but let it be clearly understood that settlements for charitable uses are not perpetuities within the meaning of the word as used in the prohibitory clause."

The reason why charities have always been exempt from the operation of the rule against perpetuities seems to be this: Ordinary perpetuities are not allowed because it is contrary to the public interest to permit the vesting of estates at a period greater distant than that allowed by common law, or by statute, as the case may be; but, since charitable trusts are meant for the public good, the reason for the rule against perpetuities fails. Therefore, the rule does not apply, in view of the familiar maxim of jurisprudence that "when the reason of a rule ceases so should the rule itself." (Civil Code 3510.)

SUMMARY

To summarize, we find that charities are favored by the law: that, in order to carry out the general charitable intent of the donor the courts will apply the cy pres doctrine when necessary; that charitable institutions are limited as to tort liability, and are exempt from the rule against perpetuities and taxation; that charities may be regulated but not destroyed; and that charities may be created for any purpose which is for the general public good.

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